STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6860

Petitions of Vermont Electric Power Company, Inc. (VELCO) and Green Mountain Power Corporation (GMP) for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing VELCO to construct the so-called Northwest Vermont Reliability Project, said project to include: (1) upgrades at 12 existing VELCO and GMP substations located in Charlotte, Essex, Hartford, New Haven, North Ferrisburgh, Poultney, Shelburne, South Burlington, Vergennes, West Rutland, Williamstown, and Williston, Vermont; (2) the construction of a new 345 kV transmission line from West Rutland to New Haven; (3) the reconstruction of a portion of a 34.5 kV and 46 kV transmission line from New Haven to South Burlington; and (4) the reconductoring of a 115 kV transmission line from Williamstown to Barre, Vermont –	)

Order entered: 3/11/2005

ORDER RE MOTIONS TO ALTER OR AMEND AND

REQUEST FOR CLARIFICATION AND OTHER CORRECTIONS

Introduction

On February 9, 2005, Meach Cove Real Estate Trust ("Meach Cove") filed a motion to alter the Public Service Board's ("Board") Order of January 28, 2005 (the "Order"). On

February 11, 2005, a joint motion to alter the Board's Order was filed by the Town of New Haven ("New Haven") and Ray and Alison Simmons.[1] On the same date Vermont Electric Power Company, Inc. ("VELCO") filed a request for clarification of the Board's Order.[2]

In this Order we grant in part and deny in part Meach Cove's motion. We deny the motions of New Haven and the Simmons. Finally, we clarify and make corrections to the Order.

Meach Cove

The Motion

Meach Cove asks that the Board amend page 122 of our Order where, under the heading Discussion, the first sentence states: "For the reasons stated in the above findings, the 115 kV line must incorporate the mitigation measures described in Finding ? to avoid an undue adverse aesthetic impact." Meach Cove contends that the sentence should be rewritten to state: "For the reasons stated in the above findings, the 115 kV line must incorporate the mitigation measures described in Findings 317, 319, and 320 to avoid an undue adverse aesthetic impact."

Additionally, Meach Cove requests that the Order:

> state that the issuance of the CPG ["certificate of public good"] does not preclude or otherwise bar Meach Cove from contesting that eminent domain of its property is not necessary under 30 V.S.A. § 110, nor required for VELCO to provide adequate service to the public under 30 V.S.A. § 112(3).

Responses from Parties

On February 28, 2005, the Department of Public Service ("Department") filed comments supporting Meach Cove's requested findings and opposing Meach Cove's requested language regarding eminent domain proceedings. The Department states that Meach Cove's requested

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1. We treat this joint motion as two separate motions throughout this Order. New Haven did not raise issues related to medical devices during the evidentiary proceedings or in its briefs, therefore it has no standing to contest those portions of the Order dealing with this issue. Likewise, the Simmons did not raise the issue of ANR's duty to file testimony pursuant to Section 248(a)(4)(E) and consequently have no standing to contest this issue.

2. On February 18, 2005, Frederick M. Peyser, a party to this Docket, filed a letter with the Board. We treat this letter as a public comment rather than as a motion to reconsider for three reasons: (1) the letter was filed after the deadline for filing motions to reconsider/alter; (2) the letter does not appear to be served on all parties; and (3) the letter was not filed by Mr. Peyser's counsel.

findings are consistent with the Department's position on the necessary aesthetic mitigation for this area.

The Department opposes Meach Cove's request to add the eminent domain language to the Order. The Department points out that parties have not briefed the issue of collateral estoppel, and that the issue is not ripe as there are no pending condemnation proceedings resulting from this Docket.

VELCO filed an opposition to Meach Cove's motion on February 28, 2005. VELCO argues that the Board should modify the Order to reference only finding 320 in the discussion section on page 122. VELCO contends that finding 320 is the only finding for the segment of line crossing the Meach Cove property, while the other two findings requested by Meach Cove are conditions for the area of the Bostwick Road crossing. Additionally, VELCO points out that the Order uses the singular "Finding" rather than the plural "Findings."

VELCO objects to Meach Cove's proposed language regarding eminent domain "because it would eliminate all binding affect of the Board's Order in regard to the route it has selected." VELCO contends that, as Meach Cove has provided testimony on the need to locate the proposed 115 kV line on its property and the Board has ordered that the 115 kV line be located on Meach Cove's property, "there should not be an absolute restriction on the preclusive effect of the Board's Order." Additionally, VELCO points out that the issue is not ripe, and it is unknown whether any condemnation proceedings will be needed.

Discussion

Meach Cove's assertion that Findings 317 and 319 should be included in the sentence is not supported by the plain language of the Order. Findings 317 and 319 clearly refer to the portion of the 115 kV line from Mile Marker 20.3 to 20.8, whereas the subject of the Discussion in issue refers to the portion of the 115 kV line from Mile Marker 20.9 to 22. The only aesthetic mitigation measure included in the findings related to Mile Marker 20.9 to 22 is finding 320 — "Lower pole heights for the 115 kV line in this area would reduce the visual impacts from Shelburne Museum and Shelburne Farms."

On page 122 of the Order, the first sentence under the heading Discussion shall state: "For the reasons stated in the above findings, the 115 kV line must incorporate the mitigation measures described in Finding 320 to avoid an undue adverse aesthetic impact."

We decline to modify the Order to include language regarding any preclusive effect of the Order on any future eminent domain proceeding involving Meach Cove. There are no condemnation proceedings that arise from our Order at this time. If the issue does arise, parties will then have the opportunity to brief the issue of collateral estoppel as it relates to the Board's Order.

New Haven

The Motion

New Haven contends that the Board erred by ruling that the Agency of Natural Resources' ("ANR") failure to submit evidence and recommendations on public health and safety, aesthetics, and historic sites, as required by Section 248(a)(4)(E), is insufficient cause to deny issuing a CPG to VELCO. New Haven characterizes the Board's Order as "excusing the failure by the Agency of Natural Resources to submit the required evidence and recommendations on the grounds that New Haven should filed in Superior Court . . . ." New Haven argues that the Board's statement that the proper remedy for ANR's failure to provide testimony on all aspects of Section 248(b)(5) is to obtain a writ of mandamus from a state court is in error. New Haven contends that such a requirement runs counter to the doctrine of primary jurisdiction. New Haven asserts that, as VELCO has the burden of proof, it was VELCO's responsibility to compel ANR to produce the necessary evidence.

New Haven contends that ANR's failure to provide testimony on public health has led to the Board's failure to understand the impact of electromagnetic fields ("EMF") on medical devices: "Instead of being able to rely on evidence and recommendations from the Agency of Natural Resources, the Board relied on the testimony of Dr. Peter Valberg, VELCO's witness." The appropriate remedy, according to New Haven, is for the Board to conclude that "the absence

of mandatory evidence and recommendations from the Agency of Natural Resources precludes issuance of a CPG."

Response from Parties

On February 23, 2005, ANR filed a response opposing New Haven's motion. ANR contends that Section 248(a)(4)(E) is directory rather than mandatory as it does not provide a consequence for failure to follow the statutory language.

In addition, ANR states that, rather than file findings on aesthetics and health itself, it coordinated with other state agencies. Further, ANR contends:

> To suggest that the information provided by the state through VDH [Vermont Department of Health] was somehow of a different quality or effect than what may have been provided by the Agency, such that the Board would have come to a different conclusion, is absurd. The sole difference would have been the letterhead under which the information was submitted.

Finally, ANR asserts that New Haven's motion fails to understand the doctrine of primary jurisdiction by asserting that the Board's statement that New Haven should have sought relief in superior court is at odds with the doctrine. ANR contends that the doctrine of primary jurisdiction prevents an outside tribunal from answering a substantive question, but does not prevent an outside tribunal from addressing a procedural remedy.

On February 28, 2005, the Department filed a letter opposing New Haven's motion. The Department contends that the Board does not have the authority to deny a petition filed under Section 248, on the basis that ANR failed to meet "its asserted statutory obligation." The Department contends that "it would be unfair to render a petitioner unable to prove its case simply by failure of another party to provide evidence."

The Department further argues that the Board does not have authority to compel ANR to produce evidence, as suggested by New Haven, as "ANR is not a utility over which the Board has general jurisdiction under 30 V.S.A. §§ 203 or 209." Additionally, the Department requests that the Board reconsider its statement that "The plain language of the statute creates a duty upon ANR" as the Board cannot grant the relief requested. In the alternative, the Department

recommends that the Board, at a minimum, clarify that "the order does not determine precisely what ANR's duty is under § 248(a)(4)(E) or whether ANR contravened that duty."

The Department expresses concern that New Haven's argument appears to be predicated on the assumption that the Board rejected New Haven's argument regarding ANR based upon the ability of New Haven to seek a remedy in superior court. The Department requests that the Board clarify that "the Order neither determines nor depends on whether a remedy is available in superior court."

The Department also argues that New Haven did not raise its claim that ANR did not fulfill its statutory obligation in a timely manner. The Department contends that New Haven should have filed a motion objecting to the Department's testimony on EMF within 30 days of the filing of the testimony, as required by Board Rule 2.216.

The Department contends that, if the Board does rule on the obligation of ANR, that it rule that the statute does not require ANR to provide evidence on every finding to be made under Section 248(b)(5) and the ANR met its obligations under the statute. The Department argues first that Section 248(a)(4)(E) is "directory" rather than "mandatory," and second, that the use of the phrase "any finding" in the statute should not be read to imply that ANR must provide evidence on all findings. The Department concludes by observing that it "is statutorily empowered with the discretion to provide evidence on all issues in a § 248 proceeding should it choose to do so." In this Docket, the Department chose to sponsor evidence on aesthetics and EMF. "The Board may and did properly rely on the Department's evidence on aesthetics and health and safety without requiring duplication of that effort by another state agency."

On February 28, 2005, VELCO filed a letter opposing the motions of New Haven and the Simmons. VELCO contends that New Haven's reading of Section 248(a)(4)(E) is "overbroad, impractical, unreasonable and not mandatory." Specifically, VELCO argues that "[a]n agency should not be required to file redundant testimony if it concurs with evidence presented by the petitioner and other agencies." VELCO also asserts that Section 248(a)(4)(E) is directory rather than mandatory as the "statute does not state that it is mandatory and there is no consequence for failure to abide by the statute's dictates."

Discussion

We reject New Haven's motion to reconsider our determination that we cannot, solely on the basis of ANR's failure to submit evidence on aesthetics and public health, deny issuing a CPG to VELCO. We also explicitly reject New Haven's interpretation of our ruling as "excusing the failure by the Agency of Natural Resources to submit the required evidence and recommendations on the grounds that New Haven should have filed in Superior Court . . . ." This characterization is simply not correct. We did not excuse ANR's failure; rather, our Order clearly stated, "In the absence of a statutory remedy, we find that it would be unreasonable to interpret the statute to create as a remedy harm to Petitioners for ANR's failure."

New Haven has not provided any new arguments regarding this issue. Rather, it has raised a separate issue of the appropriate venue for pursuing a claim against ANR for failure to present evidence. There is no need for the Board to rule on the issue of venue at this time. Neither do we believe that New Haven's repetition of arguments that we previously rejected require us to readdress the real issue of whether it is possible for the Board to rule on VELCO's petition if ANR did not fulfill its statutory obligation. New Haven's motion is denied.

In rejecting New Haven's motion, there is no need for us to revisit our characterization of ANR's obligations under Section 248. Accordingly, we do not address the Department's arguments regarding this issue.

Simmons

The Motion

The Simmons contend that the Board's Order contains the following factually incorrect statement: "There are established EMF standards for people with pacemakers and the record shows that the EMF levels from the proposed Project will be below these standards."[3] The Simmons contend that the record in the case demonstrates that "peak projected electric field levels directly beneath the future line configurations exceed reported interference thresholds."[4]

3. Docket 6860, Order of 1/28/05 at 76.

4. Exh. Valberg Rebuttal-1at 15.

The Simmons contend that, accordingly, the Board has created a situation where "residents of New Haven or Shelburne with pacemakers, or visitors or tourists with insulin pumps, may never again walk their dog, jog, stroll, or bicycle along town roads that cross the ROW [right -of-way] . . . ."

The Simmons conclude by stating that reconsideration of the Board's conclusions under criteria (b)(1), (b)(2), (b)(4), and (b)(5) is appropriate because

> [t]he Board's weighing of the risks and benefits of the NRP ["Northwest Reliability Project"], as compared to the risks and benefits of withholding approval of the NRP to develop nontransmission alternatives, was based on a mistaken understanding of the real-life costs of operating the 115 kV and 345 kV lines.

Response from Parties

On February 28, 2005, The Department filed a letter stating that clarification of the Board's Order, with respect to the impact of the proposed Project on medical devices, is warranted, but the further relief requested by the Simmons should be denied. With respect to the Simmons's motion regarding medical devices, the Department proposes the following clarifying language:

> There are no state or federal standards for medical device exposure to EMF. The ACGIH has established EMF guidelines for workers with cardiac pacemakers, and other medical devices for which there is no specific information from the device manufacturer. The ACGIH guidelines are not health-based, but rather are identified to control EMF exposure of workers and 'are not intended to demarcate safe and dangerous levels.' Exh. Mark-2 at 47. There is no evidence in the record that standards have been established by any other recognized authority for other medical devices. There is no evidence in the record that EMF from power lines, which are ubiquitous in our society, has caused disruption of medical devices.

The Department contends that the Simmons's requested relief; that the Board conclude that the proposed Project "will result in higher levels of electric fields than the recognized standards say are safe for persons with pacemakers and other medical devices," is factually incorrect. The Department asserts that there is "no evidence in the record of a health-based standard for pacemakers and other medical devices."

VELCO disputes the Simmons's assertions regarding the impact of the proposed Project on medical devices. VELCO cites to evidence in the record that states: "Actual malfunction of an in-use pacemaker by powerline electric fields has not been known to occur."[5] VELCO contends that the record indicates that there are no health-based standards relating to the exposure of medical devices to EMF. In addition, VELCO contends that it would be bad policy for the Board to set restrictive standards for electric fields given that "the FDA has deemed it more effective to regulate medical device manufacturers to ensure that those devices are immune to electric field impacts, base on society's broad exposure to electric fields."[6] Finally, VELCO asserts that "the Board made no errors of fact in regard to its findings on interference with medical devices" and consequently, the Board's weighing of the risks and benefits of the proposed Project were correct.

Discussion

We agree with the Simmons that the statement in our Order: "There are established EMF standards for people with pacemakers and the record shows that the EMF levels from the proposed Project will be below these standards" is factually incorrect. We disagree with the Simmons that the proper recourse is reconsideration of our conclusions under several of the Section 248 substantive criteria.

We do not find helpful the Simmons's assertions of the alleged consequences that would occur if VELCO was allowed to construct the proposed transmission lines. There is sufficient evidence in the record to indicate that the EMF resulting from the proposed lines will not present a health risk to individuals with medical devices. Common sense, combined with the evidence that this problem has not occurred anywhere in the United States,[7] indicates that the existence of transmission lines is not currently preventing individuals with medical devices from "ever again walking their dog, jog, stroll, or bicycle along town roads that cross the right-of-way."

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5. Citing Exh. Valberg Reb-1 at 19.

6. Citing to Exh. Valberg Reb-1 at 3, 22.

7. Valberg pf. reb. at 3.

The Department has proposed language that best represents the evidence in this Docket and accurately captures the Board's conclusions on this issue. Accordingly, we adopt the following language:

> There are no state or federal standards for medical device exposure to EMF. The ACGIH has established EMF guidelines for workers with cardiac pacemakers, and other medical devices for which there is no specific information from the device manufacturer. The ACGIH guidelines are not health-based, but rather are identified to control EMF exposure of workers and 'are not intended to demarcate safe and dangerous levels.' Exh. Mark-2 at 47. There is no evidence in the record that standards have been established by any other recognized authority for other medical devices. There is no evidence in the record that EMF from power lines, which are ubiquitous in our society, has caused disruption of medical devices.

VELCO

The Motion

VELCO requests that the Board clarify four issues. First, VELCO asks the Board to clarify the deadline for submission of a schedule to address future compliance filings. Second, VELCO asks that, with respect to the required relocation of the 345 kV and 115 kV lines in Salisbury, we clarify the Order to state that the relocation is required only if it is feasible. Third, VELCO asks that we clarify that it be able to continue to work with the Department of Public Service ("Department") to determine the optimal aesthetic mitigation for several portions of the 345 kV line. Finally, the Order states on page 73 that there are two residences within 100-feet of the proposed 115 kV, excluding the Bay Road area. VELCO asks that the Board identify the location of these residences.

Response from Parties

On February 28, 2005, the Department filed a letter addressing each of VELCO's requested clarifications. The Department supports the March 28, 2005, deadline for filing for the post-certification schedule, as requested by VELCO.

The Department contends that the Board should clarify that the precise location of the Salisbury reroute, including the beginning and end points, will be determined during post-

certification review. The Department recommends that the Board deny VELCO's request that the Board require the Salisbury reroute only if it is determined to be feasible.

The Department contends that the Salisbury reroute is significantly different from the relocation of the New Haven substation and placement of the 115 kV line near Bay Road underground. The Department asserts that the installation of an overhead line has less potential to negatively impact the environment and that VELCO has significant experience with siting overhead lines while addressing potential environmental impacts. In addition, the Department disputes VELCO's contention that its aesthetic witness recommended specific alternative aesthetic mitigation. Finally, the Department argues that the Order's language provides added incentive for VELCO and other parties to site the Salisbury reroute "in a manner that meets both aesthetic and environmental criteria" and that VELCO may file a motion to amend the CPG if the Salisbury reroute is truly not feasible.

With respect to VELCO's requested clarification of the 345 kV design changes recommended by Mr. Raphael, the Department:

> supports that Board's issuance of an order that indicates that the final details of implementing the required design changes for Whipple Hollow Road, the Salisbury reroute, and Hunt/Town Hill Roads in New Haven will be determined in the post0certification review process.

The Department also supports VELCO's request that the Board clarify the location of the two residences located within 100 feet of the proposed 115 kV line.

Discussion

On page 216 of the Order, we required VELCO to submit a detailed schedule within two months of the issuance of the Order. At page 219, the Order refers to a filing schedule of March 1, 2005. The correct deadline is two months after the issuance of the Order, which would be March 28, 2005.[8]

The Board's Order, in its discussion of the aesthetic impacts of the 345 kV line in Salisbury concludes: "moving both the proposed 345 kV line and the existing 115 kV line to the

8. The Board issued a memorandum on March 2, 2005, clarifying this issue.

west, from poles 207 to 226, is required to avoid undue adverse aesthetic impacts." As VELCO points out in its Request for Clarification, there has been no evaluation of the feasibility of rerouting these portions of the two transmission lines. In our decisions to relocate the New Haven substation and place the 115 kV line underground in the vicinity of Bay Road, we stated that VELCO must perform these latter actions unless its was not feasible to do so.

We concur with the Department's assessment of the distinction between the situations at New Haven and Bay Road and the Salisbury reroute. The construction of an above-ground transmission line entails significantly less environmental analysis than the construction of a substation or the placement of a transmission line underground. VELCO and the parties should make best efforts to accomplish the Salisbury reroute in an environmentally acceptable manner. If VELCO is unable to obtain the necessary permits, it may file a request to amend the CPG.

It would be appropriate for VELCO to work with the Department to determine the appropriate aesthetic mitigation along the proposed 345 kV line. The final determination of the appropriate aesthetic mitigation will be determined during post-certification proceedings. We strongly caution VELCO that our ruling on this issue is not intended to provide an opportunity to renegotiate the mitigation requirements of our Order, but is intended to provide the parties an opportunity to particularize the details of the necessary aesthetic mitigation in these areas.

On page 73, the Order states that there are two residences within 100-feet of the proposed 115 kV right-of-way, excluding the Bay Road area. Both residences are located in the Town of Charlotte; the first is located at pole number 290.[9] The second is located just south of pole number 238. These two residences do not include the location of the line at the Ferry Road crossing, as the final configuration has not yet been determined.

Other Corrections

The Board has identified three other typographical errors in the Order, which have no material impact on the Order. We correct these errors as follows.

9. The pole references are from Exh. G&B-Supp(2)-5.

At page 110, the top Discussion section, the sentence should state: "For the reasons stated in the above findings, the new GMP substation at Kayhart Crossing line must incorporate the mitigation measures described in Finding 268 to avoid an undue adverse aesthetic impact."

In paragraph 19 of the Order section, at page 228, and at paragraph 18 of the Certificate of Public Good, the sentence should read: "In selecting transformers for the proposed Project, the Petitioners must employ a methodology that accounts for the cost of transformer losses."

At page 11, the second paragraph, line 7, the word "has" should read "have."

SO ORDERED.

Dated at Montpelier, Vermont, this 11th day of March, 2005.

s/Michael H. Dworkin)
)
s/David C. Coen)
)
s/John D. Burke)

PUBLIC SERVICE BOARD OF VERMONT

OFFICE OF THE CLERK

FILED: March 11, 2005

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.